No. 87-1308

IN THE

Supreme Court of the United States

October Term, 1987

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

JOSEPH N. GRANO, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

In this case, the District of Columbia Board of Elections duly certified for the ballot an initiative measure to preserve a historic building. App. 3a, 23a, 55a, 56a. District of Columbia voters were to vote on the measure on November 8, 1983. Id. Petitioners, officials of the District of

Columbia government ("the District")[1/] could have intervened in the certification process before the Board of Elections, D.C. CODE §§ 1-1320(o) (formerly § 1-1320(p)(1)), 1-1312(o)(2), and could have brought suit to challenge the certification of the measure, Dankman v. District of Columbia Board of Elections and Ethics, 443 A.2d 507, 511 (D.D.C. 1981). They did neither.

Respondents, who were the proponents of the initiative, requested the District to postpone demolition of the historic building until the voters could express their will. Complaint, Grano v. Barry, No. 83-2225 (D.D.C.) ¶ 13. Faced with governmental silence, id., respon-

1/ The petition names the District of Columbia as a party. This is incorrect. The named defendants were the Mayor and two subordinate officials of the District of Columbia Government, sued in their official capacity. The District as a political body never intervened and is not a party eo nomine.

dents sued under 42 U.S.C. § 1983 for an injunction against issuance of a demolition permit on the ground that demolition would effectively deprive them and all District of Columbia voters of the right to vote on the initiative. App. 4a, 57a. The district court agreed, App. 57a-62a. It granted respondents' motion for summary judgment, "holding [as the D.C. Circuit described it, App. 24a] that [respondents'] right to vote would be violated were the permits for demolition and construction granted before the election."

The district court issued a permanent injunction against issuance of a demolition permit prior to the election, to continue, if the initiative passed, pending its implementation. App. 24a, 67a-68a. The District appealed, and the initiative passed while the appeal was pending. The D.C. Circuit held the

District's appeal moot as to the injunction against demolition before the election, App. 5a, 24a-26a. It vacated the injunction's continuance after the election for want of federal jurisdiction; once the citizens had voted and their right to an effective vote preserved by the injunction, no further constitutionally protected rights were in issue. App. 5a, 26a-29a. The District sought no review in this Court.

Respondents applied for attorney's fees under 42 U.S.C. § 1988. The district court held that respondents had prevailed in their suit to preserve the right to vote on the initiative, App. 48a-49a, and awarded attorney's fees. Id. 50a-51a. The District appealed. The D.C. Circuit agreed that respondents "clearly obtained a significant benefit when they succeeded in ensuring that the voting would take place while the Rhodes

Tavern still stood...." App. 8a, and ruled that respondents had prevailed for purposes of 42 U.S.C. § 1988. App. 18a. The D.C. Circuit remanded, however, for district court findings on the District's argument that exceptional circumstances would make an award of fees unjust. App. 13a-15a, 18a-19a. The District sought no review in this Court.

On remand the district court applied Supreme Court, D.C., Second and Eighth Circuit precedents to hold that "[n]o special circumstances exist ... with regard to the District's unsuccessful attempt to thwart the right to vote...." App. 40a. The District appealed again and the D.C. Circuit affirmed again.

The D.C. Circuit approved the district court's finding "that the plaintiffs' victory was not pyrrhic be-

cause they successfully secured for the electorate a meaningful right to vote; Rhodes Tavern was not demolished before the referendum." App. 33a. It approved the district court's holding that the District was not required to choose between competing constitutional claims, Pet. 16, for the District "was not a passive observer ... was not compelled to oppose plaintiff[s]" and "could have requested a declaratory judgment." App. 33a. The court of appeals rejected the District's attempt to relitigate the merits of the original permanent injunction, App. 34a. Finally, it rejected the District's claim that its "good faith" should absolve it from liability for fees. App. 34a-35a.

REASONS FOR DENYING THE WRIT

1.

This case has become a paradigm of the "second major litigation" over

attorney's fees that this court condemned in Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). The work on the merits of respondents' successful voting rights suit began in August 1983 and was completed with oral argument of the appeal in February 1984, App. 20a. For that work, the district court awarded $38,926.25 in attorney's fees. App. 51a. For respondents' attorney's work during the four years since, in opposing the District's repeated challenges to the district court's award of attorney's fees for the work on the merits, the district court has awarded $34,621.50, App. 43a, 51a, not counting work on the District's last appeal and this petition for certiorari, which will cost an estimated $15,000 to $20,000 more. Thus the time spent on fee litigation will considerably exceed the time spent on

the merits of this case, a result this Court has deplored.

Six court of appeals judges have considered and rejected the issues the District raises here on the merits (i.e. that the claims in plaintiffs' complaint for injunction "clearly do not state valid civil rights claims," Pet. 10 [emphasis in original]) and on attorney's fees: Judges Wald, Bork, Starr (App. 21a, 26a n. 2), Mikva and Silberman (App. 2a) of the D.C. Circuit Court of Appeals (App. 2a) and Judge Friedman of the Federal Circuit Court of Appeals (App. 30a). Surely these issues have consumed enough judicial resources; as we show below, they lack merit enough to have gone as far as the District has taken them already.

2.

The linchpin of the District's argument is that respondents' suit was not

a valid civil rights suit to preserve their right to vote in an upcoming election. Pet. 10. That issue became moot when the election took place and the citizens voted on the initiative. The District nevertheless continued to seek appellate review of the merits of the district court's grant of summary judgment to respondents and issuance of a permanent injunction respecting the November 1983 elections. App. 24a-26a, 11a, 34a.

The D.C. Circuit declined to revisit the merits, all three panels holding the issues moot. App. 24a-26a (noting in that first decision that the holding of mootness "is not dispositive as to the issue of attorney's fees," id. 26a n. 2), 11a-12a, 34a. However, on the six occasions that courts have ruled on the nature of respondents' underlying claim (three times in the district

court, three times on appeal) the courts have repeated their characterization of the suit as one to preserve the right of the citizens of the District of Columbia to vote in the November 1983 election on an initiative that had been validly certified for the ballot. App. 59a-60a, 48a-49a, 40a (District Court), 24a-26a, 8a-9a, 32a (Court of Appeals).

The District did not avail itself of its opportunity to seek this Court's certiorari review of the first appellate decision that held the issue moot (App. 20a-29a). It should not be permitted to do so now through the back door of its challenge to attorney's fees.

3.

It is now virtually black letter law under 42 U.S.C. § 1988, and other exceptions to the "American rule," that where a party obtains the relief he seeks by litigation, and it is clear

that the litigation itself was instrumental in obtaining the relief, entitlement to attorney's fees is not affected if the passage of time (as in this case) or voluntarily compliance by defendants renders further judicial proceedings, including appellate review, moot. See, e.g., Williams v. Alioto, 625 F.2d 845, 847-48 (9th Cir. 1980) (per curiam), cert. denied, 450 U.S. 1012 (1981); Doe v. Marshall, 622 F.2d 118, 119-20 (5th Cir.), reh. denied, 627 F.2d 239 (5th Cir. 1980), cert. denied, 451 U.S. 993 (1981), cert. denied, 462 U.S. 1119 (1983); Bagby v. Beal, 606 F.2d 411, 414-15 (3rd Cir. 1979);[2/] Reiser v. Del Monte Properties Co., 605 F.2d 1135,

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2/ Where, in a moot case in which attorney's fees were awarded the court of appeals declined to "do indirectly what we cannot do directly ... review the merits of the case in order to determine whether the appellee is entitled to receive reasonable attorney's fees under ... 42 U.S.C. § 1988," id. at 414.

1139 (9th Cir. 1979); Criterion Club of Albany v. Board of Commissioners of Dougherty County, Georgia, 594 F.2d 118, 120 (5th Cir. 1979) (voting rights case); Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188, 1196 (6th Cir. 1974), cert. denied, 422 U.S. 1048 (1975).

Respondents' lawsuit and the permanent injunction they obtained prevented the destruction of the historic building and made it possible for the voters of the District of Columbia to vote on the initiative measure in November 1983. Hence respondents were a "prevailing party" by reason of the district court's decision. They did not lose prevailing party status when the election took place, mooting the District's appeal before it could be heard and decided. It is the District's argument, that relief by court order requires more

proof of the merit of a plaintiff's claims than voluntary compliance (Pet. 10-15), which would stand logic "on its head" and which "makes no sense." Pet. 15. As the Court of Appeals held, "when the party has prevailed as a direct result of a district court order accepting his civil rights claims on their merits, the issues of causation and colorability are clear, and the frivolousness test serves no purpose." App. 11a - 12a.

4.

The District claims that special circumstances make an award of fees unjust because they chose in good faith to favor the property owner's "right" to tear the building down, over the electorate's right to vote to enact a statute that would prevent it. Pet. 16-19.

a. That the local court later declared the enacted statute unconstitutional does not, even nunc pro tunc, justify the District's strenuous efforts to deny the voters an effective vote. As this court holds, the proper procedure is to allow the vote to take place. If the vote goes against the property owner, then the statute is ripe for challenge in the local courts -- which is what happened here, Pet. 17. City of Eastlake v. Forest City Enterprises, 426 U.S. 668, 677 (1976).

b. Whatever "right" the property owner had to tear the building down could be abrogated by statute, see Penn Central Transportation Co. v. City of New York, 438 U.S. 104, reh. denied, 439 U.S. 883 (1978). It could be lawfully suspended pending the vote on a duly certified referendum (or initiative), County of Kauai v. Pacific Standard Life

Ins. Co., 653 P.2d 766, 775-76 (Haw. 1982), appeal dismissed, 460 U.S. 1077 (1983). The temporary delay in issuance of the permit would not have been ripe for suit by the owner for compensation (even if that would justify abridgement of the right to vote), Pet. 4, 17-19, not only until the voters had approved the initiative, see County of Kauai, but until the Congress had approved it, see App. 5a. Indeed it would not have been ripe until the statutory procedures were concluded, see Pet. 3, and a final decision whether and how to preserve the building reached under those procedures, see MacDonald, Sommer & Frates v. Yolo County, 477 U.S. ___, ___, 106 S.Ct. 2561, 2566-69, reh. denied, ___ U.S. ___, 107 S.Ct. 22 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, ___, 105 S.Ct. 3108, 3117-3122

(1985). Even then no suit for compensation would lie unless that final action denied the owner, permanently or temporarily, "all use of his property," First English Evangelical Lutheran Church v. Los Angeles County, ___ U.S. ___, 107 S.Ct. 2378, 2388-89 (1987),[3/] which landmark legislation ordinarily does not, cf. Penn Central, 438 U.S. at 130-31.

c. For the absurdity of the District's claim that respondents' suit did not involve the right to vote, Pet. 17, see App. 57a-60a.

d. The District's argument reduces to one that their perceived conflicting duties and good faith choice to side with the property owner (Pet. 18) constitute special circumstances that make an award of fees unjust. The argu-

3/ And "for a considerable period of years," 107 S.Ct. at 2389; at least six in that case, id. at 2388.

ment blows in the face of settled law. See, e.g., Wilson v. Stocker, 819 F.2d 943, 951 (10th Cir. 1987); Jones v. Wilkinson, 800 F.2d 989, 992 (10th Cir. 1986), aff'd, ___ U.S. ___, 107 S.Ct. 1559 (1987); J.J. Anderson Inc. v. Town of Erie, 767 F.2d 1469, 1474 (10th Cir. 1985), and cases cited; Cunningham v. City of McKeesport, 753 F.2d 262 (3rd Cir. 1985), vacated and remanded, ___ U.S. ___, 106 S.Ct. 3324, reinstated, 807 F.2d 49 (3rd Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 2179 (1987); In Re Kansas Congressional Districts Reapportionment Cases, 745 F.2d 610, 613 (10th Cir. 1984); Espino v. Besteiro, 708 F.2d 1002, 1005-06 (5th Cir. 1983); Miller v. Staats, 706 F.2d 336, 343 (D.C. Cir. 1983); Burke v. Gurney, 700 F.2d 767, 772 (1st Cir. 1983), and cases cited; Ellwest Stereo Theater, Inc. v. Jackson, 653 F.2d 954,

955 (5th Cir. 1981); Teitelbaum v. Sorenson, 648 F.2d 1248, 1250-51 (9th Cir. 1981); Riddell v. National Democratic Party, 624 F.2d 539, 545 (5th Cir. 1980); International Oceanic Enterprises, Inc. v. Menton, 614 F.2d 502, 504 (5th Cir. 1980); Brown v. Culpepper, 559 F.2d 274, 278 (5th Cir. 1977).

e. The District's professed bewilderment at how it could have sought a declaratory judgment, instead of opposing respondents' right to vote, is disingenuous. See, e.g., District of Columbia Board of Elections v. District of Columbia, 520 A.2d 671, 672 (D.C. 1986) (District sued the Board of Elections for declaratory judgment and injunction to eliminate overnight shelter initiative from the ballot); Ohio Ex. Rel. Celebrezze v. United States Dep't of Transportation, 766 F.2d

228, 232 (6th Cir. 1985) (state had standing to seek declaratory judgment regarding the constitutionality of its own statute).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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